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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 37

THE UNITED STATES OF AMERICA, APPELLANT

v.

WOMEN'S SPORTSWEAR MANUFACTURERS ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the District of Massachusetts (R. 26-35) is reported in 75 F. Supp. 112.

JURISDICTION

The district court entered judgment for appellees on December 10, 1947 (R. 26). The petition for appeal was filed on February 9, 1948, and was allowed the same day (R. 222-223). The jurisdic-

tion of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as last amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess., 15 U.S.C. 29. Probable jurisdiction was noted on April 19, 1948 (R. 231).

QUESTION PRESENTED

Whether restraints imposed upon Massachusetts jobbers of women's sportswear engaged in interstate commerce by a combination of Massachusetts contractors who as independent businessmen perform an essential part of the manufacturing process for the jobbers restrain interstate commerce in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U.S.C. 1.]
>
> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts,

> under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 4.]

STATEMENT

This is an equity suit brought by the United States in the District Court for the District of Massachusetts against Women's Sportswear Manufacturers Association, an unincorporated association doing business in Boston, Massachusetts, its officers and members, charging appellees with being engaged in a combination and conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Act, and praying that the court dissolve appellee Association, cancel an allegedly illegal agreement entered into by it, and enjoin the consummation by it of similar agreements in the future (R. 1-11).

The court denied motions filed by various appellees seeking to dismiss the complaint as failing to state a cause of action (R. 26). At the ensuing trial, 22 witnesses testified, all but one of them called by the Government. Following the conclusion of the trial and oral argument, the court rendered an opinion concluding that the activities of appellees were local in nature, involving only an interference with manufacturing, and neither intentionally nor directly involving restraints on interstate commerce (R. 26-35).

We do not understand that there is any significant dispute between the parties as to the facts of

the case. The following statement is based upon the findings of fact, all of which the Government accepts, and upon the evidence underlying the findings.

Boston is the fifth largest producing center of women's sportswear (jackets, skirts, blouses, and other garments made from woolen, rayon, and cotton fabrics) (R. 29, 171-172). The Boston sportswear business is carried on by so-called jobbers who compete on a national basis with each other and with producers from other areas (R. 29, 40, 171-172). The Boston jobber invariably maintains sales offices in New York and often in other cities, and employs one or more salesmen, depending on the scale of operations, who travel throughout the United States seeking orders (R. 28, 69-70, 114-115). The jobber customarily maintains little by way of inventory; he manufactures mostly only upon a specific order (R. 29, 118, 121; cf. R. 90-91). On receipt of an order from his sales office or force, the jobber purchases the fabrics necessary to fulfill the order. Usually the jobber places his order for the fabrics through sales offices which producing mills customarily maintain in New York, and the fabrics may be sent to the jobber either directly from the mill or from its New York sales agent (R. 28-29, 71-72, 87, 124). About 80% of the cloth used by Boston area jobbers in the production of women's sportswear is manufactured in mills located outside of Massachusetts (R. 29, 83, 90, 103, 107).

The jobber cuts the fabric according to his patterns and the customer's order, and then usually employs, to do the stitching and put on the necessary ornaments, an independent contractor in the Boston area who has a shop or factory in which sewing machines have been installed. The contractor, upon completion of the stitching, returns the garments to the jobber, who immediately ships them to the customer (R. 28-29, 86). A few jobbers perform some or all of the stitchwork themselves (R. 133, 189). The cost of stitching was found to be approximately 25% of the sales price of the garments (R. 29); several witnesses testified that the figure was one-third (R. 57, 86, 98-99, 134, cf. R. 140-141; 146, 149). The court expressly found that "the prices charged by these contractors for stitching sportswear garments, are reflected in the wholesale and retail prices of the finished garments" (R. 33). At least 80% of the sportswear produced in Massachusetts is sold to customers located outside of that state (R. 29, 76, 83, 86, 87, 90, 98, 103, 107).

The defendant Association, organized sometime before December 1943, is an organization of contractors in the Boston area who handle 50% to 65% of all sportswear produced in Boston (R. 29). At all times throughout the period covered by the complaint defendant Bernard Rosenberg was the Executive Director of the Association (R. 30, 150, 151). Beginning about March 1, 1944, Rosenberg notified certain jobbers that continu-

ance of their relations with contractors necessitated the establishment of equitable business dealings to remove evils which created disputes between jobbers and contractors (R. 30; Exs. 6 and 7, R. 216-217). "This was done for the purpose of having the jobbers sign an agreement with the contractors concerning these matters" (R. 30).

"A proposed written agreement (Plaintiff's Exhibit 3 [R. 207-210], required the jobber to employ only members of the defendant Association, to refrain from dealing with non-member contractors, to distribute his work equitably among the Association contractors engaged by him, to furnish the contractor with written orders setting out the price for the work, to refrain from accepting secret rebates, and to pay to the contractor the amount of the unemployment compensation insurance, health and vacation fund and Labor Day pay attributable to the services of the contractors' employees" (R. 30).

Despite the urgings of Rosenberg, the jobbers had reached no agreement with the defendant Association by September 25, 1944 (R. 30). On that date Rosenberg wrote to the Executive Director of the Wholesale Garment Association, an organization of jobbers, threatening a stoppage of production by contractor members of appellee Association on October 2, 1944, if its demands were not met by September 30, 1944 (Ex. 2, R. 207). A conference of representatives of the jobbers and

of appellee contractors met (R. 30, 47) to consider an agreement proposed by appellee Association (Ex. 3, R. 207-210). Appellee Rosenberg, at this conference, repeated his threats to stop production on the jobbers' work unless the agreement was signed (R. 47, 74). The jobbers refused to sign the proposed agreement, and gave as a ground of objection that their attorneys advised that the proposed agreement, which did not differ materially from the agreement subsequently executed, was violative of the antitrust laws (R. 30, 47-48, 60-62).

On October 2, 1944, contractors then engaged in work for three jobbers stopped work.[1] Appellee Association ordered the stoppages because the jobbers refused to execute the agreement submitted to them by the Association, and the affected jobbers were so informed by their contractors (R. 31, 74-75, 125-126). These jobbers then obtained a restraining order in the state court and the contractors thereafter resumed work (R. 31, 48). Further negotiations between appellee Association and the jobbers immediately followed, as a result of which the proposed agreement was revised. As so revised, the agreement was signed by 21 jobbers on October 17, 1944, and it remained in force unaltered at the time this proceeding was commenced. (R. 31, 48-50.) The 21 jobbers signatory to the agree-

[1] These jobbers were Kenniston Klassics, Banner Sportswear, and College-Town Sportswear (R. 31, 48), all of whom were subsequently required to sign the agreement (Ex. 4, R. 210-213).

ment manufacture a substantial percentage of all women's sportswear produced in the Boston area,[2] their production having an annual gross value of about $8,800,000 (R. 29).

The basic provisions of the executed agreement (Ex. 4, R. 210-213), to which all individual agreements between jobbers and contractor are made subject, is the requirement that the jobber shall give all his work to Association contractors in good standing with the International Ladies' Garment Workers Union (ILGWU) and available for performing his work, provided such contractors are comparable as to price and quality of work with non-member contractors. A non-member contractor employed by a jobber at the time of execution of the agreement may, however, continue to work for the jobber even though the contractor does not become a member of the Association. "The Association agrees to assist the Jobber in getting sufficient contractors as the amount of work of the Jobber may equitably require, and the Jobber agrees that in the distribution of his work he will divide such work as equally and equitably as possible among the Association Contractors engaged by him" (R. 211). The jobber is required to furnish the contractor with a written order setting out the price, and is forbidden to receive secret rebates from the

[2] The court made no explicit finding in this respect. Of the two witnesses who testified on this point, one estimated roughly that the 21 jobbers signatory to the agreement produced 50% of all sportswear manufactured in the Boston area (R. 52); the other, between 80 and 90 per cent (R. 185, 188-189).

contractor. Provision is also made for compulsory arbitration of disputes.[3]

While the court found that there was little evidence of operations under the agreement (R. 32), the record furnishes some indication. Thus, the minutes of a meeting of the Association of November 10, 1944, note the appointment of a "committee on designation of contractors to the jobbers" (Ex. 10, R. 219, 220). Despite the obscurity of the phrase, it seems reasonably clear that the function of the committee was the "equitable" apportionment of the jobber's work among the contractors which the agreement contemplated. Minutes of a meeting of May 16, 1945, also include this paragraph (Ex. 12, R. 221):

> It is requested to investigate the Ernest Donath Sportswear about giving out work to non-members of the Association.

The district court found that "one of the purposes of the Association was to maintain the standard of prices charged the jobbers * * *." (R. 32).

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[3] In three aspects of present significance, the jobbers succeeded in obtaining better terms than those in the agreement first proffered by the Association (Ex. 3, R. 207-210). (1) The original proposal would not have permitted jobbers to continue relations with those non-Association contractors with whom they were, respectively, dealing at the time of the agreement. (2) The original proposal would have prevented jobbers from undertaking to do their own stitching work, beyond the extent to which they were so engaged at the time of the agreement. (3) The executed agreement (Ex. 4, at R. 211) required jobbers to restrict their dealings to Association members only as long as they were "comparable as to price and quality of work" with non-member contractors.

There was, in fact, substantial uniformity in prices charged by contractors (R. 147). Price discussions took place at meetings of appellee Association in which contractors reported prices being received by them and "whether someone is working for less than the other" (R. 95). The Association's president stated that the contractors should be combined "in case prices will come down after the war" (R. 93).

The district court made no findings as to the terms upon which non-member contractors might be admitted to the Association. It is, however, apparent from the record that there are impediments to membership. The following is an extract from the minutes of the Association meeting of October 31, 1944 (Ex. 9, R. 218):

> Mr. Morris Isenberg, suggested that it would be advisable to admit members into the association who have been already established in the business for years and not new comers in the trade.
>
> Mr. Rosenberg, suggested that we have a membership committee and that all applications be sent to the membership committee for approval before action is taken at the meeting. A motion was made and seconded to have a membership committee, motion carried. * * *

Subsequently, the minutes of a meeting of November 14, 1944, reflect reference of an application for membership to the Membership Committee thus set up "for investigation and approval" (Ex.

10, R. 219). Applications of former members for reinstatement were referred to the Membership Committee "for action" (*ibid.*, R. 220).[4]

Attempted Labor Union Orientation of the Agreement. Appellee contractors maintain shops or factories in which machinery is installed, and hire workers many of whom are members of the International Ladies' Garment Workers Union. The contractors themselves are independent businessmen who are not members of, or qualified for membership in, this labor union (R. 190).

The draft of agreement first proposed by appellee Association (Ex. 3, R. 207-210) contained no reference to the ILGWU beyond a provision which, after recognizing that most contractors were bound by contract to provide funds to the ILGWU for a health and vacation fund, would have obligated the jobbers to pay to contractors amounts so assessed.[5] Following the jobbers' objection to the proposed

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[4] In addition to the power to exclude from membership, appellee Association may at times have endeavored to employ coercive means to force non-member contractors into membership. The following entry in the minutes of the meeting of December 26, 1944 (Ex. 11, R. 221), is not clarified by anything further in the record:

> Mr. Rosenberg, reports that he has an appointment with Mario on Wednesday Dec. 27th, 1944 for the purpose of him joining the Association. It is the consensous [*sic*] of opinion that the Union take steps on the following shops: Fields, Fishel and J. Rosenberg, for them to join the Association.

[5] These payments had been borne by the contractors, and under the agreement, as finally executed, they continue to be borne by the contractors. But the jobber now deducts from monies owed to the contractor the amount payable on account

agreement, as generally violative of the antitrust laws, a revision was prepared (before this Court's decision in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797) which, as actually executed, makes extensive references to the ILGWU (Ex. 4, R. 210-213). Thus, it recites that appellee Association, the contractors, and jobbers all are in contractual relationship with the ILGWU, and it describes the undertakings of the parties "as in furtherance of their several obligations to said I.L.G.W.U." The key provision whereby the defendant contractors sought to monopolize the business of the jobbers reads (Ex. 4, R. 210, 211):

> The Jobber, having already agreed with said I.L.G.W.U. to employ only contractors who are in contractual relationship with the said I.L.G.W.U., agrees to give all his work to members of the Association who are in good standing with said I.L.G.W.U. * * *

The District Court found, however, that "there is no evidence that said Union participated in drawing up the proposed agreement between the jobbers and contractors" (R. 31). Kramer, local manager of the Boston local of ILGWU and the

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of the ILGWU fund and remits such amount to a designated agent of the Association (Ex. 4, R. 210, 212).

The contractors also sought originally to shift to the jobber the economic burden of federal and state payroll taxes to establish unemployment insurance and old age assistance plans (Ex. 3, R. 207, 209). Again, the eventual agreement provided only that the jobbers should deduct such sums (payable to the Association's nominee) from monies otherwise owing to the contractors (Ex. 4, R. 210, 212).

only witness called by appellees, testified that the Union had long had contractual relations both with jobbers and contractors (R. 181-182). It did insist that its agreements with jobbers provide that the jobber use only contractors who had agreements with the ILGWU, believing that control of contractors through the jobbers was appropriate because contractors in the main were composed of less responsible elements (R. 173, 191-192). But no union agreement required the jobbers to give work to contractors who were members of the Association (R. 184). Kramer favored the contractors getting together, and he attended a meeting at which the final contract was drafted (R. 49, 57, 84, 169-170).

The Association does not represent a grouping of contractors who have "union shops" through agreement to employ ILGWU members. Despite the declarations of the agreement, some of the contractor members of the Association had no agreement with the ILGWU;[6] some contractors who are not members of the Association have agreements with the ILGWU and are "union shops."[7]

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[6] Kramer, manager of the local Boston affiliate of ILGWU and a vice-president of the latter, testified that he had no contract, written or oral, with appellees Rocco Cerasulo (R. 179), and Bella Kritchmar (R. 181). An agreement with appellee Kaufman had expired in 1946 (R. 179); and one with appellee LaPorto had been made only in late 1945 (R. 181).

[7] There is no direct evidence in the record on this point. But this would seem to be a necessary inference from Kramer's testimony that only 6 or 7% of the contractors in Boston

Nor is it true, despite the agreement's recitals, that all jobbers signatory to the agreements had entered into contracts with the ILGWU.[8] Furthermore, there are apparently a number of jobbers, not signatory to the agreement, who have agreements with the ILGWU (R. 187-188).

The district court concluded that appellees' activities were purely local, affecting directly only the manufacture of sportswear in Massachusetts, and having only an indirect and remote effect on interstate commerce. It held that only such a combination as either intentionally restrained interstate commerce or had a sufficiently direct and immediate effect on such commerce as to enable a court to infer an intent to restrain interstate commerce violated the Sherman Act. It considered that there was no direct evidence of intent to restrain interstate commerce and that such an intent would be inferred only if the combination's activities enabled it actually or potentially to monopolize articles of commerce, control their prices, or discriminate between potential purchasers. (R. 32-35.)

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operate "non-union shops" (R. 186), whereas the 20 appellees had only about 50% to 65% of the total business performed by the 40 contractors in the area (R. 189-190).

[8] Kramer, in his testimony, went through the list of jobbers who executed the Association's agreement (Ex. 4, R. 210), and identified four jobbers who were not in contractual relationship with the ILGWU or its Boston local (R. 181-183). They were Zakonit, Inc., Churchill Sportswear, Elleny Sportswear, and Franklin Sportswear Company. Kramer also testified that he had an oral agreement with Colback Sportswear, Inc. (R. 183), but Colback's treasurer testified that its employees were not members of any union (R. 83).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In determining that the restraints resulting from appellees' combination were not restraints upon interstate commerce prohibited by Section 1 of the Sherman Act.

2. In concluding that none of the appellees committed any violation of the Sherman Act, and in denying appellant's prayer for relief.

SUMMARY OF ARGUMENT

1. The types of restraint upon competition undertaken by appellees are unquestionably forbidden by the Sherman Act. It does not appear that a labor union was a party to the combination, but labor participation could not in any event render the combination exempt from the Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797.

2. This Court has held that the Sherman Act is an exercise of the full commerce power of Congress over the types of restraints which the statute forbids; it thus plainly applies to intrastate activities restraining interstate commerce. Appellees' plan was designed to interfere with the business of the jobbers, who were clearly engaged in interstate commerce since 80% of the cloth they purchased and the garments they sold crossed state lines. In concertedly refusing to work for any jobber who would not deal with them exclusively, appellees threatened to destroy the jobbers' entire business, and thus to halt both the outgoing shipments of

sportswear and incoming shipments of cloth. In addition, a purpose and undoubtedly an effect of the scheme was to stabilize prices paid to contractors by the jobbers. This would have the effect of lessening interstate competition among the Boston jobbers and, by increasing their costs, of impairing their competition with other manufacturing centers.

Such restraints upon commerce have often been held to violate the Sherman Act. The case is stronger than the *Mandeville Farms* case, in which the effect upon the interstate price structure and competition was not so clearly shown. As the *Mandeville* case emphasizes, an integrated interstate industry cannot be viewed as constituting merely local segments whose operations do not affect other portions of the business.

Proof of a substantial economic effect upon interstate commerce is sufficient, irrespective of whether the effect may be described as "direct" or "indirect" from the standpoint of immediate causation within the meaning of some of the older cases. The fact that the combination was confined to a single local area, and that its primary concern was with the industry in that area is immaterial, when the obvious consequences of the plan were to restrain interstate commerce.

ARGUMENT

Appellees' Combination Was In Restraint of Commerce Among the States In Violation of the Sherman Act

1. *Appellees were engaged in the type of restraint prohibited by the Act.* Appellees have engaged in an actual and threatened boycott against jobbers who refused to agree to deal with them exclusively,[9] have required that work be allocated "equitably" —and therefore not on a competitive basis—among the contractors engaged by a jobber, and have acted in a manner designed to maintain price standards and eliminate price competition. Assuming the requisite effect upon interstate commerce, these types of restraint upon commercial competition violate the Sherman Act *per se*. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. Boycotts: *Fashion Originators' Guild* v. *Federal Trade Commission*; 114 F. 2d 80 (C.C.A. 2), affirmed, 312 U. S. 457; *International Salt Co.* v. *United States*, 332 U. S. 392, 396. Allocation of customers or territories: *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 291 (C.C.A. 6), affirmed, 175 U. S. 211; *United States* v. *Aluminum Co.*, 148 F. 2d 416, 427 (C.C.A. 2); *Pfotzer* v. *Aqua-Systems*, 162 F. 2d 779, 784 (C.C.A. 2). Price restrictions: *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

Appellees have argued that their conduct is not of unlawful type because they were cooperating

[9] The fact that certain exceptions were permitted does not change the character of the offense. Cf. *International Salt Co.* v. *United States*, 332 U. S. 392, 397-398.

with a labor union, the International Ladies Garment Workers Union. The trial court found that "There is no evidence that said Union participated in drawing up the proposed agreement between the jobbers and contractors" (R. 31). Even if it had, however that fact would not provide appellees with a defense, inasmuch as participation by a labor organization with employers in an otherwise unlawful combination does not take the combination outside the Sherman Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797.

But, in any event, appellees did not establish that the union was a party to the unlawful scheme. For appellee contractors are independent business concerns; they are not members of the union and are not eligible for membership. They employ labor and have the same contractual relations with the union as any other employer. See R. 190, 178 *et seq.* Their relation to the workers is more distant than that of the fishermen held to be *entrepreneurs* and not employees in *Columbia River Packers Association* v. *Hinton,* 315 U. S. 143. Although the union was interested in having the jobbers deal only with unionized contractors, some non-unionized contractors were in the Association and some unionized contractors were not. See page 13, *supra.* The recitals of the agreement finally adopted, purporting to base the agreement on obligations to the I.L.G.W.U. (R. 210-211), must be considered in the light of the facts that the early

drafts had contained no such intimation, and that the revision of the agreement occurred after the first drafts had been challenged as in violation of the antitrust laws. See also R. 184.

The remainder of this brief assumes that the restraints discussed are of the sort which the Sherman Act forbids.

2. *The conspiracy restrained interstate commerce.* This brings us to the basic issue in the case, whether interstate commerce was sufficiently affected to bring appellees' conduct within the Sherman Act. This Court has frequently held that the Sherman Act extends to intrastate activities which affect or restrain interstate commerce. *Mandeville Island Farms* v. *American Sugar Co.*, 334 U. S. 219; *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *Local 167* v. *United States*, 291 U. S. 293; *United States* v. *Patten*, 226 U. S. 525; *Swift & Co.* v. *United States*, 196 U. S. 375; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495-498. The test applied in Sherman Act cases has been the test applied under the Commerce Clause of the Constitution itself.[10]

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[10] See cases cited above and *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457; cf. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601; *Wickard* v. *Filburn*, 317 U. S. 111.

Indeed, this Court has repeatedly declared that: "with reference to commercial trade restraints such as [the Act reaches], Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed'." *United States* v. *Frankfort Distilleries*, 324 U. S., at 298; *Apex Hosiery Co.* v. *Leader* 310 U. S. 469, 495. *United States* v. *South-Eastern Underwriters*, 322 U. S. 533, 553. These principles have often been applied to bring within the Sherman Act the activities of local combinations whose conduct interfered with interstate commerce. *Mandeville Island Farms* v. *American Sugar Co.*, *Local 167* v. *United States*, and *United States* v. *Patten*, cited *supra*; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797; *United States* v. *Brims*, 272 U. S. 549.

In this case the jobbers, whose business has been restrained by appellees, are clearly engaged in interstate enterprise. They purchase 80% of the cloth used from outside Massachusetts and sell about the same proportion of the finished product to purchasers in other states (R. 29). In concertedly refusing to work for any jobber who would not deal with them exclusively, appellees threatened to destroy the jobbers' entire business. This would have had the effect both of halting the outgoing shipments of sportswear and the incoming shipments of cloth, and of forcing recalcitrant jobbers out of interstate competition.

In addition, a purpose and undoubtedly an effect of the scheme was to stabilize prices paid to contractors by the jobbers. Although prices were not directly fixed, the provisions of the contract and the concerted activities of the contractors clearly made departure from the prevalent uniform prices unlikely. See pp. 9-10, *supra*. Inasmuch as the payments to the contractors, who performed the major portion of the jobbers' manufacturing operations, constituted an important part of the jobbers' cost (see p. 5, *supra*), the elimination of competition as to this cost factor would affect competition among the jobbers in the interstate market in two ways. By establishing a partially uniform basis of costs, it would lessen the competition among the Boston jobbers themselves in the interstate market. Secondly, the absence of competition with respect to contractors' costs would inevitably increase such costs and thereby, as the findings (R. 33) indicate, tend to increase the prices at which the jobbers must sell their garments to purchasers in other states. Such a forced increase in interstate prices not only in itself restrains interstate commerce, but it also impairs the capacity of the Boston jobbers to compete with jobbers from other manufacturing centers in the interstate market.

Such restraints have often been held to be restraints on interstate commerce within the meaning of the Sherman Act. More clearly here than under the allegations of the complaint in the

Mandeville Farms case decided last Term (334 U. S. 219), will the removal of local competition have the effect of "lessening of competition in the later interstate phases of the over-all activities". 334 U. S. at 240. The Court there referred to "the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar" (*id.* at 241.) The opinion continued, "The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept" (*ibid*).

In the *Mandeville* case, the Court was speaking of stabilization of the price for the raw material. Here appellees have combined to stabilize the price of the primary manufacturing operation. But the restraining effect of each upon interstate commerce in the ultimate product is of the same kind. Indeed, the dissenting opinion of Mr. Justice Jackson in the *Mandeville* case clearly implies that if there had been a specific allegation that "the cost * * * of the product which did move in interstate commerce was in any way affected" (334 U. S., at 248), a cause of action under the Sherman Act would have resulted. Such a finding as to effect upon interstate price was made in the instant case (R. 33, *supra*, p. 5).

Apart from the effect upon prices, the threat to boycott a business enterprise engaged in interstate commerce, which will force it out of business and interrupt interstate shipments to and from it, is clearly in restraint of interstate commerce within the meaning of the Sherman Act. *Montague & Co.* v. *Lowry, Local 167* v. *United States, United States* v. *Frankfort Distilleries, United States* v. *South-Eastern Underwriters, Fashion Originators' Guild* v. *Federal Trade Commission*, all *supra*. It is immaterial whether or not the immediate impact of the restraint is upon the local aspect of the enterprise, as long as interstate commerce is substantially affected. In addition to the Sherman Act cases cited, decisions under the National Labor Relations Act, including *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, in the very industry involved here, attest to the fact that an interruption of manufacturing in the center of the stream of commerce has a direct restraining effect on the flow of commerce to and from the manufacturing enterprise.

The *Mandeville* case emphasizes that an integrated interstate industry cannot be broken up into local segments whose operations do not affect other portions of the business. In that case the restraint upon growers' sales occurred before interstate commerce began. In the instant case, the restraint is upon manufacture in the middle of what has been characterized as a current of

interstate commerce[11] from the producer of the raw material to the ultimate consumer. The elimination of competition in an important phase of the processing of a commodity, most of which has come from and will move to other states, necessarily will interfere with the interstate aspects of the industry.

The court below relied largely upon *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and other labor cases discussed in the *Apex* opinion. See R. 32-34. But the *Apex* case held only that the physical interruption to interstate commerce resulting from the seizure of a factory by force during the course of a labor dispute was not the type of restraint against which the Sherman Act was aimed. The restraints of trade at which the Act was directed, the court held, were restraints upon free competition among business men—precisely such as we have in the case at bar. See, in addition to *Apex*, *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 806, 809. The *Apex* opinion on its face definitely and repeatedly rejected the contention made by appellees below that a restraint of the type reached by the Sherman Act and affecting interstate commerce sufficiently to come within the scope of the federal commerce

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[11] See *Swift & Co.* v. *United States*, 196 U. S. 375, 399; *Stafford* v. *Wallace*, 258 U. S. 495, 516, 518-519; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 34-36; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 35-36.

power may nevertheless not be within the statute's coverage. For the Court stated in the *Apex* case pp. 495, 498):

> * * * The addition of the words "or commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, * * * so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. * * * It was in this sense of preventing restraints on commercial competition that Congress exercised "all the power it possessed." *Atlantic Cleaners & Dyers* v. *United States, supra*, [286 U. S.] 435.
>
> * * * * *
>
> * * * In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. * * *
>
> * * * This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

The court below was apparently misled by the language of the older labor cases[12] into holding that the statute did not extend to intrastate transactions which did not "directly and immediately" affect interstate commerce. These cases, however, were employing the "direct-indirect" formula primarily in a constitutional context. The lower court's theory as to the construction of the Sherman Act is in substance the formula as to the extent of constitutional power over intrastate transactions enunciated by a majority of this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 307-308—that the power extends to intrastate acts which *directly* affect interstate commerce, and that the effect, in order to be direct, must be one which "shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition."

But this Court has abandoned the test of immediate causation, which—though perhaps relevant in tort law—is totally unrelated to the objects of both the commerce clause and the Sherman Act, and now is concerned with whether there is in fact a substantial practical effect upon interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 303 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *National Labor*

[12] *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 395; *Industrial Association* v. *United States*, 268 U. S. 64; *Levering & Garrigues* v. *Morrin*, 289 U. S. 103.

Relations Board, 303 U. S. 453; *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, 317 U. S. 111; *North American Company* v. *Securities and Exchange Commission*, 327 U. S. 686; *Mandeville Island Farms* v. *American Sugar Co.*, 334 U. S. 219.

The recent treatment of the subject in the *Mandeville case* (334 U. S. at 229-235) proves that the Court does not continue to read into the Sherman Act the "direct-indirect" formula which it has rejected as constitutional doctrine. Certainly the Sherman Act, as much as the commerce clause itself, is concerned with economic realities and should not be given an artificially restrictive construction. For this reason, cases under the National Labor Relations Act holding that precisely the same type of restraining effect upon commerce is subject to the power of Congress under the commerce clause are pertinent here. *National Labor Relations Act* v. *Jones & Laughlin*, 301 U. S. 1; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

Here there can be no question that appellees' plan threatened to halt, if their terms were not met, the interstate shipments of the products of an important industry into and out of Massachusetts. The fact that this interruption would first interfere with manufacturing activities in Massachusetts, and that this interruption of manufacture would bring about the cessation of interstate commerce cannot blind the courts to the fact

that the conspiracy itself is unquestionably responsible for a substantial threat to interstate commerce. And the same is true of the effect of appellees' program upon the prices of the finished products and upon competition in the interstate market. See pp. 20-21, *supra*.

Inasmuch as the effects upon interstate commerce are substantial and obvious, it is immaterial that appellees' motivation may have been only to interfere with the manufacture of sportswear in Massachusetts. For it has long been established that under the Sherman Act a specific intention to restrain interstate commerce is not essential, and that "the conspirators must be held to have intended the necessary and direct consequences of their acts * * *, * * * by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Reading Co.*, 226 U. S. 324, 370." *United States* v. *Patten*, 226 U. S. 525, 543. See also *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 511; *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *Local 167* v. *United States*, 291 U. S. 293.

Nor is it material that the conspiracy may not have substantially affected the entire national market, "so long as control is exercised effectively in the area concerned". *Mandeville Farms* case,

334 U. S., at 236; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225; *Indiana Farmer's Guide* v. *Prairie Farmer*, 293 U. S. 268, 279. Here the interference was with the fifth largest manufacturing center in the United States; the business of the jobbers who signed the agreement was about $8,800,000 (R. 29). Interference with any such volume of commerce is unquestionably sufficient to violate the Sherman Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed.

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Reply Brief for the U.S.

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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1948

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REPLY BRIEF FOR THE UNITED STATES

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I

THE RESTRAINT WAS DESIGNED TO ELIMINATE COMPETITION AMONG BUSINESSMEN, AND NOT MERELY TO MAINTAIN LABOR STANDARDS

In the brief which we received February 21, 1949, as a substitute for the brief filed October 1, 1948, respondents argue that the contract here involved is in substance a labor agreement, solely directed to the maintenance of labor standards, and therefore exempt from the Sherman Act under the doctrine of the *Apex* case. In view of the points advanced for the first time in the new brief,[1] it seems desirable to call the Court's

[1] No such argument was advanced in the brief originally filed by respondents.

attention in more detail than in our main brief to the facts of record which refute the argument.

Respondents do not go quite so far as to describe their association as a labor organization; the title "Women's Sportswear Manufacturers Association" would make that too difficult. But they do contend that when the District Court found that "One of the purposes of the Association was to maintain the standard of prices charged to jobbers for doing the stitching operations on the sportswear garments in the Boston area" (R. 32), it was really speaking only of "labor costs", and that the "sole purpose" of the agreement was to maintain labor standards (Respondents' Brief, p. 30).

I. In the first place, the amounts paid to contractors by the jobbers were not mere "labor costs". It is probably true that the largest part of the contractors' expenses are for labor. But the trial court found that "The defendant contractors have shops or factories in the Boston area, where they have installed sewing machines" (R. 29). And the "price" which the contractors received did not merely cover labor costs, but was an over-all amount out of which the contractors were required to pay for their machinery and equipment, for the space in which the shop or factory was located, and for overhead. The difference between these costs and the "price" was the contractor's profit.

The contract first proposed referred to "the price agreed to be paid for the *manufacture* of garment or garments by the contractor" (R. 209).[2]

Clearly the word "price" as used in the industry and by the court below—and, indeed, repeatedly in the very contracts here involved (R. 208–209, 211)—accurately describes the amount paid by the jobbers to the contractors as independent businessmen, and not merely an amount paid for labor costs. The contractors were clearly independent manufacturers, as the names both of their Association and of their individual firms show.[3] And since their income is derived from profits, they have the same incentive as other businessmen to increase profits by eliminating competition.

2. The record also proves that the maintenance of labor standards was not the sole purpose of the agreement, and suggests that it may not have been the purpose at all.

The agreements proposed by respondents did not require the jobbers to deal only with contractors complying with certain minimum labor standards, or even with the standards prescribed by the I. L. G. W. U., or with contractors who were under contract with the Union. But they

[2] All italics in this brief are supplied.

[3] For the firm names see R. 2–4. Illustrative are Kay's Sportswear, Inc., Fisher Garment Company, Century Manufacturing Co., Bell Sportswear Mfg. Co.

did require jobbers to deal only with members of the contractors' Association.

The agreement first proposed by the contractors (Exhibit 3; R. 207–210), did not refer to the union (except in relation to its "Health and Vacation fund"). (Paragraph 7, R. 209–210)). It provided merely that jobbers should employ only contractors who were members of the Association. After the jobbers objected to this agreement as in violation of the antitrust laws (R. 30, 47–48, 60–62), a new agreement was prepared, with the assistance of counsel (R. 49). This agreement (Exhibit 4, R. 210–213) shows on its face that it was not requiring the jobbers to give their business merely to contractors in contractual relation with the I. L. G. W. U. The jobber was required to "give all his work to *members of the Association* who are in good standing with the I. L. G. W. U." (paragraph 1; R. 211). In other words, a jobber could not give work to a contractor in good standing with the Union if he was not also a member of the Association. The first clause of the paragraph shows that the jobber already had agreed with the union "to employ only contractors who are in contractual relationship with said I. L. G. W. U." That there were such contractors outside of the Association appears from the last clause in the same paragraph; the limitation to members of the Association was for "so long as members of the Associa-

tion are available for performance of his work, and are comparable as to price and quality of work with other *Contractors who are in contractual relationship with said I. L. G. W. U. and are not members of the Association.*" (R. 211.)

Apart from the contracts, the testimony referred to in our main brief (pp. 13–14) shows that some contractors not in the Association had agreements with the Union and that some members of the Association did not.[1] And the Union official called as a witness admitted that the Union agreement did not require a jobber "to give his work to contractors who belonged to the Women's Sportswear Manufacturers Association," but only to contractors who employed union labor (R. 184).

It is thus apparent that respondents' plan was designed to protect the contractors against competition from other contractors, inasmuch as the requirement that jobbers deal only with members of the Association, as distinct from contractors having union shops, was not necessary to protect labor.

Respondents would be in no better position even if it be assumed that *one* of the purposes of the plan was to maintain labor standards—and that is the most that they can urge. That also was true in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797. A purpose of the combination there involved, and undoubtedly the prin-

[1] This has not been denied in respondents' brief.

cipal purpose of the labor organization which initiated the program and which was the defendant in the case, was to improve the working standards of the employees, "to further their own interests as wage earners." (*Id.* at 801, 798). But since the combination of businessmen and union *also* intended to exclude outsiders from the market, even the union was held to have violated the Sherman Act. In this case the businessmen, the contractors, certainly intended to exclude others from competing against them, whether or not they also had a purpose to protect labor standards. Thus our argument (Main Br. p. 18) that union participation would not immunize the contractors was clearly correct under the *Allen Bradley* case, despite respondents' labelling of the point as "fantastic." (Resp. Br. p. 31). The case differs from *Allen Bradley* in that, although the union here seems to have been interested, it did not participate in the plan; and also because the history of the plan and its terms reveal that the alleged labor motivation was largely protective coloration for what the contractors were seeking to do.

3. Respondents have referred to the recommendations of the Advisory Commission appointed by Governor Smith in 1924 to investigate the Cloak, Suit and Skirt industry in New York (Resp. Br. pp. 33–34). The excerpt quoted by respondents show that that Commission recommended that "every jobber shall, in accordance with a stand-

ard to be agreed upon between the parties, select and designate the submanufacturers he needs to handle his production, leaving him the necessary freedom in securing samples and in changing submanufacturers for cause shown." But that is not what we have here. In this case the contractors in combination require the jobbers to deal exclusively with members of the contractors' Association; the individual jobber is not given the right to "select and designate" the contractors he needs, except within the Association. Whether the program recommended for the New York industry would violate the Sherman Act might depend on how it would operate in practice; in any event, no question as to that is presented here.

II

THE GOVERNMENT'S POSITION AS TO THE EXISTENCE OF A BOYCOTT

Note should be made of respondents' reiteration (Br. p. 8, 35) that the Government has abandoned its contention that appellees did not engage in a boycott. For this respondents rely on the statement in the Government's main brief (p. 4) that the Government "accepts" the trial court's finding of fact.

The trial court's findings first set forth the facts in some detail, including findings that the contractors stopped work for certain jobbers because the jobbers refused to sign the proposed agreement requiring them to deal exclusively

with members of the Association (R. 30–31). This was a boycott. *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457. The last sentence in the section of the trial court's opinion designated as "Findings of Fact" stated that "none of the defendants attempted * * * to boycott any concern or interfere with the manufacture or sale of its goods outside of Massachusetts" (R. 32). This was a general conclusion, to which the Government formally assigned error (R. 224, Asgt. 7). In other portions of our brief we accurately refer to respondents' scheme as a "boycott." We did not intend our general acceptance of the findings to waive this assignment, particularly when the general conclusory finding is inconsistent with the prior specific finding.

The important matter, of course, is what respondent actually did, not the court's characterization of it, or even whether it falls within the loose term "boycott." And, whatever it be called, the refusal or threatened refusal to permit the jobbers to deal with non-members of the Association, and the agreement to that effect, violate the Sherman Act.

III

WITH RESPECT TO RESTRAINTS UPON COMMERCIAL COMPETITION THE SHERMAN ACT IS CO-EXTENSIVE WITH THE COMMERCE POWER

In our main brief, we have argued both that the types of effect on interstate commerce shown in this case have often been held to be restraints

within the meaning of the Sherman Act (pp. 20–24, 27–28), and that with reference to the types of restraint at which the Act was directed Congress exercised all the power it possessed under the Commerce Clause (pp. 19–20, 24–27). Respondents continue to insist, however, that even as to the types of commercial trade restraints covered by the Act, "Congress did not exercise all its power with respect to the Sherman Act" (Resp. Br. 21), and that the Labor Board cases are therefore inapposite.

To prove the contrary, our main brief quoted from the *Apex* case, upon which respondents primarily rely, and from *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 298. See main brief, pp. 20, 25. In view of respondents' refusal to accept these opinions as authoritative on this proposition, we wish to go back to original sources and call to the Court's attention the various statements at the time the Sherman Act was before Congress which demonstrate that Congress intended the Act to reach all commercial restraints which it was possible to prohibit under the commerce power.

Senator Sherman, in explaining his original bill on March 21, 1890,[5] declared that its purpose was (21 Cong. Rec. 2457):

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[5] The bill finally passed was not Senator Sherman's but one largely drafted by Senator Edmunds, and explained to the Senate and House by him and by Representative Culberson, respectively, who are quoted in the text. (See *Apex Hosiery*

> to arm the Federal courts *within the limits of their constitutional power*[6] that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. * * *

On April 8, after the Senate Judiciary Committee had submitted the bill in substantially its present form, Senator George, who was one of its draftsmen,[7] stated (21 Cong. Rec. 3147):

> The Bill has been very ingeniously and properly drawn to *cover every case which comes within what is called the commercial power of Congress.*

Representative Culberson, who was in charge of the bill in the House, stated on May 1, 1890 (21 Cong. Rec. 4091):

> Now, it is suggested that Congress ought to go further. It is very difficult to say how it could do so. *It occupies now in this bill, or attempts to occupy, the sphere allotted to it in the regulation of commerce between the States.* * * *

On June 11, the House Conferees submitted a report in which they stated (21 Cong. Rec. 5950):

Co. v. *Leader*, 310 U. S. 469, 489, and authorities cited.) But although the original bill differed greatly from that finally passed, there was no difference in ultimate objectives or in the intention to use all of the constitutional power available.

[6] All italics herein are supplied.

[7] See Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 North American Review 801, 802 (1911).

> In the original bill [which was the one finally passed] two things were declared illegal: Contracts in restraint of interstate trade or commerce, and the monopolization of such trade.
>
> Its only object was the control of trusts, so called, *so far as such combinations in their relation to interstate trade are within reach of Federal legislation.*

On June 16, in discussing an amendment (which did not pass) proposed by the House, Senator Edmunds, who had reported the final bill out of the Judiciary Committee, stated (21 Cong. Rec. 6116):

> I think myself that this amendment of the House was wholly unnecessary, but the original bill as it passed the Senate *was adequate to cover every case over which Congress had power,* and broad enough to include every case of wrongdoing of any kind of that nature. * * *

On June 20, 1890, on the occasion of the final conference report to the House immediately prior to the passage of the present act, Representative Kerr of Iowa stated (21 Cong. Rec. 6313):[8]

> When this bill was before the House recently the gentleman from Texas [Mr. Culberson], in discussing its provisions, made the statement that the *power given in this bill was an exercise of the entire power of the General Government over the*

[8] See also the statement of Representative Enloe on the same page.

> *subject* of trusts, and that its provisions presented the matter in a shape to obtain the decisions of the courts, out of which we might gather the full extent of the power of the Government on that subject. * * *
>
> * * * * * *
>
> *My opinion is that it will be the exercise of the entire power of the Government over the subject*, except insofar as it applies to the Territories and the District of Columbia.

On the same day, the last speech on the floor of the House, immediately preceding the unanimous adoption of the bill by the House, was made by Representative Stewart, of Vermont. He said (21 Cong. Rec. 6314):

> *are just as broad, sweeping, and explicit* * * * *The provisions of this trust bill, as the English language can make them to express the power of Congress over this subject under the Constitution of the United States.* * * *

In *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 558–559, this Court referred to some of the above passages, and concluded:

> That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far

as Congress could under our dual system, a competitive business economy.

See also *Mandeville Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219.

Respectfully submitted,

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